Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN J. HOLLAND,
Petitioner

v.

CATHERINE J. LAYTON,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court's conclusion that a defendant in a civil paternity action is not entitled to legal representation, and/or effective assistance of legal counsel, is correct; and whether the trial court's conclusion that the petitioner's appropriate remedy for being forced to proceed without legal representation is a legal action against his attorney who failed to show for trial; and where the petitioner's constitutional rights to legal representation, due process and equal protection violated?

2. Whether in a civil paternity action the state trial court's admission of properly objected to DNA tests into evidence in violation of 42 U.S.C. § 666(f) (i) (ii) (iii) and 23 Pa. C.S.A. § 4343(c) (3) violate the petitioner's statutory rights and constitutional rights to due process and equal protection.

3. Whether the trial court may disregard the statutory and constitutional requirements regarding the admission of DNA tests in reaching a conclusion of paternity.

LIST OF PARTIES

The parties are listed in the caption.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that he has no parent companies or nonwholly owned subsidiaries.

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The January 2, 2007 order of the Superior Court of Pennsylvania denying Petitioner's Request for reargument (App., Infra. 3a).

The October 24, 2006 Non-Precential Decision of the Superior Court of Pennsylvania which affirmed the Court of Common Pleas of Dauphin County. (App., Infra. 4a).

The April 26, 2005 Court of Common Pleas of Dauphin County Memorandum pursuant to PA R.A.P. 1925 (a) (App., Infra 7a.)

The February 23, 2005 Order of Paternity of the Court of Common Pleas of Dauphin County (App., Infra. 11a).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal on September 11, 2007 (App., Infra. 1a). A timely Petition for Reconsideration of Appeal was denied by the Supreme Court of Pennsylvania on October 22, 2007 (App., Infra. 2a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. Const. Amend. V

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. Const. Amend. VI

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. XIV, Sec. 1, 5

Amendment XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. §654 State plan for child and spousal support

A State plan for child support must ... (4) provide that the state will (A) provide services relating to the establishment of paternity ..., and (13) provide that the state will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for ... establishing paternity ... .

42 U.S.C. § 666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement

(a) Types of procedures required

In order to satisfy section 654 (20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

(2) Expedited administrative and judicial procedures (including the procedures specified in subsection (c) of this section) for establishing paternity and for establishing, modifying, and enforcing support obligations. The Secretary may waive the provisions of this paragraph with respect to one or more political subdivisions within the State on the basis of the effectiveness and timeliness of support order issuance and enforcement or paternity establishment within the political subdivision (in accordance with the general rule for exemptions under subsection (d) of this section).

(F) Admissibility of genetic testing results

Procedures—

(i) requiring the admission into evidence, for purposes of establishing paternity, of the results of any genetic test that is—

(I) of a type generally acknowledged as reliable by accreditation bodies designated by the Secretary; and

(II) performed by a laboratory approved by such an accreditation body;

(ii) requiring an objection to genetic testing results to be made in writing not later than a specified number of days before any hearing at which the results may be introduced into evidence (or, at State option, not later than a specified number of days after receipt of the results); and

(iii) making the test results admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy, unless objection is made.

(G) Presumption of paternity in certain cases

Procedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.

23 Pa. C.S.A. 4343

(c) Genetic Test. –

(3) To ensure integrity of the specimen and that the proper chain of custody has been maintained, the genetic test of the biological mother, the child or children in question and the alleged father should be conducted by an established

genetic-testing laboratory in the course of its regularly conducted business activity and certified records should be issued. The certified records shall be admissible into evidence without further foundation, authentication or proof of accuracy if no objection is made within ten days prior to trial. The laboratory must be certified by either the American Association of Blood Banks or the American Association for Histobompatibility and Immunogenetics.

STATEMENT OF THE CASE

Petitioner, John J. Holland, asserts in this case that the trial court's admission of properly objected to DNA tests into evidence without any foundation, authentication or proof of accuracy, and without any expert medical or scientific testimony violates the statutory requirements of 42 U.S.C. §§ 666 (F) (i), (ii), (iii) and 23 Pa. C.S.A. § 4343 (c) (3) which permits the admission of DNA tests into evidence without any foundation, authentication or proof of accuracy if no objection is made.

Petitioner also asserts that the trial court's improper admittance of the DNA tests into evidence without any foundation, authentication or proof of accuracy, and without any scientific or medical testimony imposes an impermissible legal burden on the petitioner and denied the petitioner a meaningful opportunity to be heard. Therefore, the requirement of fundamental fairness expressed by the due process clause was not satisfied here.

Petitioner further asserts in this case that the trial court's holding that in a criminal matter a defendant has a right to legal representation, but has no right to legal counsel in a civil paternity case; and the trial court's refusal to grant petitioner leave to secure legal counsel, as well as the trial court's ruling that the petitioner's legal remedy is a civil action against his attorney is clearly erroneous and violates the petitioner's constitutional rights to due process and equal protection and legal representation.

This matter arises out of a finding of Petitioner's paternity by the Dauphin County Court of Common Pleas, which was affirmed by the Pennsylvania Superior Court. Subsequently, the Superior Court denied the petition for reargument or reconsideration and the Pennsylvania

Supreme Court denied the petition for allowance of appeal and the petition for reconsideration of denial of appeal.

Trial was held on the issue of paternity on December 21, 2004 and January 3, 2005. Throughout the proceedings, the Petitioner raised timely objections to the improper admission into evidence of the DNA tests. In Pennsylvania, all domestic relation pleadings are served through the County's Domestic Relations Section. Here, as well as objecting at the proceedings, the Petitioner filed written objections on August 20, 2004, which were received by the Dauphin County Domestic Relations Section on August 23, 2004, several months prior to the December 21, 2004 and January 3, 2005 proceedings. See App. G, Infra 12a. The trial court dismissed Petitioner's objections and refused to permit Petitioner to place the written objections and the certified mail receipts into the record.

At trial, petitioner testified that he had successful vasectomy surgery and presented expert scientific and medical evidence that it was a biological impossibility for petitioner to have fathered the respondent's child. Disregarding the evidence of petitioner's sterility, the trial court reached its decision of paternity based upon improperly admitted DNA tests. The petitioner was afforded no opportunity to challenge the DNA tests which were improperly admitted into evidence without any proper proof of accuracy, authenticity, foundation, or scientific or medical testimony. Subsequently, the trial court based its opinion on the incompetent DNA tests.

The trial court's admission of the DNA tests into evidence is an error of law and a manifest abuse of discretion. The trial court's disregard of the Petitioner's timely objections to the DNA tests and the admission of incompetent evidence are extremely prejudicial and harmful to the Petitioner.

The primary issues involved in this case is concerned with the questions of whether the Respondent, Catherine J. Layton, met her evidentiary burden of establishing through competent medical testimony and scientific evidence that Petitioner is the biological father of her child; whether the evidence supports a finding of paternity; whether the trial court abused its discretion in disregarding timely written objection to DNA tests and permitting DNA tests into evidence without proper proof, authentication, proof of accuracy or any scientific or medical testimony, and in the trial court's reliance on inadmissible DNA tests in it's findings to establish Petitioner's paternity; and whether the trial courts refusal to permit Petitioner legal counsel deprived the Petitioner of his constitutional rights of due process and equal protection.

The Petitioner filed timely written objections to the admission of respondent's DNA tests and that there is no competent medical testimony or scientific evidence of the Petitioner's paternity. Here, the Petitioner did not stipulate to the admissibility of the laboratory reports. To the contrary, throughout the proceedings, the petitioner repeatedly challenged and objected to the laboratory reports. Despite Petitioner's frequent and timely objections, and though the court presumed that an objection was raised and none of the appropriate authentication is entered, nonetheless, overruled the Petitioner's objections to the DNA tests and admitted the test results into evidence without any foundation, authentication or proof of accuracy or any scientific or medical testimony to support the trial court's decision.

In addition to refusing to consider the petitioner's timely filed written objections to the DNA tests, the court also refused to allow the petitioner to place written objections and the United States Postal Service Certified

mail receipt as proof of the timely filed written objections into the record. This decision to exclude the Petitioner's written objections was harmful and prejudicial to the Petitioner at trial. The Court's refusal to allow the objections into the record further served to severely damage and prejudice the petitioner's rights to make an appellate record. The trial court's improper admission of DNA tests denied the Petitioner any opportunity to cross examine the DNA test results or any expert witnesses, which the respondent should have been required to have testify, regarding the tests. In addition, to improperly denying the Petitioner his right to introduce relevant evidence into the record of timely objections of the DNA tests, the trial court improperly admitted the DNA tests into evidence and relied on the tests in reaching its finding of Petitioner's paternity.

The court's refusal to permit the Petitioner to secure legal representation of counsel also deprived petitioner of life, liberty and property in violation of his constitution rights to due process and equal protection. At both hearings, the petitioner's legal counsel failed to appear. Petitioner's legal counsel did not advise the petitioner or the court that she did not plan to appear, nor did she offer the petitioner or the court any reason for her absence either prior to or after the hearings.

Surprised by his counsel's absence, Petitioner repeatedly requested that the court permit him the opportunity to secure legal representation. The Petitioner clearly advised the Court that he is not a domestic relations attorney or prepared to handle a paternity case. The court refused the Petitioner requests and over Petitioner's numerous objections ordered him to proceed without legal representation.

Disregarding the petitioner's requests to secure legal counsel the trial court held that petitioner's rights to legal

counsel does not apply in a civil paternity matter; that in a criminal matter that might be relevant, in this matter it is not ... and stated that petitioner's legal remedy is a cause of action against his attorney.

The petitioner asserts that the trial court's disregard of petitioner's sterility and the court's admission of properly objected to DNA tests into evidence, and the court's decision of paternity based upon the DNA tests violates the federal and state statutory requirements of 42 U.S.C. § 666(f) and 23 Pa. C.S.A. § 4343(c) (3) which further denied the petitioner a meaningful opportunity to be heard in violation of petitioner's constitutional rights to due process and equal protection.

In addition, the trial court's refusal to allow the petitioner legal representation in a civil paternity action deprived the petitioner of his constitutional rights to due process, equal protection and legal representation.

REASONS FOR ALLOWANCE OF THE WRIT

The lower court's decision that the right to legal counsel and/or effective assistance of counsel does not apply in a civil paternity action, violates the constitutional rights of the petitioner. The Pennsylvania and Federal Appellate Courts have clearly stated that it is unquestionable that in civil paternity cases, a defendant has a right to legal representation, which has been deemed a right of due process. *Kitrell v. Dakota*, 540 A.2d 301 (1988), citing U.S.C.A. Const. Amends 5, 6, 14, *Little v. Streater*, 452 U.S. at 13 (1981); the lower court also erred refusing petitioner leave to secure legal counsel in holding where petitioner's legal counsel failed to show for trial, that petitioner does not have a right to legal counsel and that petitioner's remedy is a cause of action against his attorney.

Pennsylvania appellate courts have cited this court's decision in *Streater* that a potential deprivation of liberty confronts any paternity defendant and paternity defendant must at least be afforded reasonable opportunity to secure representation of counsel to assist in defense of such claims. White v. Gordon, 460 A.2d 828 (1983); and that it is unquestionable that the imposition of parent child bonds demands procedural fairness. *Corra v. Coll*, 451 A.2d 480 (1982); and to relegate a defendant to a civil remedy of a malpractice suit for money damages is no remedy at all for the potential loss of liberty and the seriousness and permanence attached to an adjudication of paternity, *Banks v. Randall*, 466 A.2d 974, 977 (1984).

The trial court further erred by improperly admitting DNA tests into evidence without foundation, authentication or proof of accuracy or any scientific or medical testimony in violation of 43 U.S.C. § 654, 42 U.S.C. § 666(f) (i) (ii) (iii) and 23 Pa. C.S.A. § 4343(c)(3) and in relying on the incompetent evidence in reaching a decision of petitioner's paternity; and the lower court violated the constitutional protections of due process of fundamental fairness and a meaningful opportunity to be heard by allowing the inadmissible DNA tests into evidence without proper proof or any opportunity for petitioner to challenge the authenticity or reliability of the DNA tests expressed by this court in *Little v. Streater.*

I. REVIEW IS NECESSARY TO DETERMINE WHETHER A DEFENDANT IS ENTITLED TO LEGAL REPRESENTATION IN A CIVIL PATERNITY TRIAL.

A. THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER LEGAL REPRESENTATION VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS PROVIDED FOR IN U.S.C.A. CONST. AMENDS. 5, 6, 14.

On December 21, 2004 and January 3, 2005, hearings were held to establish paternity for the child born to Respondent, Catherine J. Layton. The trial record shows that without notice to petitioner or the court, the petitioner's attorney failed to show for trial. The petitioner advised the court that he was unprepared to proceed without legal counsel and requested the court's leave to secure legal representation.

The trial record shows that the court disregarded petitioner's request for legal counsel and forced the petitioner to proceed. In response to petitioner's several objections of being forced to proceed without legal representation, the Court held that petitioner's rights to legal counsel does not apply in a civil paternity matter; that in a criminal matter that might be relevant, in this matter it is not ...; and that petitioner's legal remedy is a cause of action against his attorney.

The trial court's refusal to permit the Petitioner to secure legal representation was a manifest abuse of discretion and deprived the petitioner of life, liberty and property in violation of his rights to due process and equal protection. The trial court also committed legal error in holding that the Petitioner's rights to legal counsel do not apply in a civil paternity matter that is a criminal matter that might be relevant, in this matter it is not ... and in holding that the Petitioner's remedy is a legal action against his legal counsel (who failed to appear). On appeal, the Superior Court affirmed the trial court's decision. Subsequently, the Superior Court denied the Petition for Reargument or Consideration, and the Supreme Court denied the petitions for Allowance of Appeal and Reconsideration for Denial of Appeal.

In *White v. Gordon*, 460 A.2d 828 (1983), the court held that a potential deprivation of liberty confronts any paternity defendant and paternity defendants must at least be afforded a reasonable opportunity to secure representation of counsel to assist in defense of such claims. *Id.* 830. In *Corra v. Coll*, 451 A.2d 480 (1982), the court held that it is unquestionable that the imposition of parent child bonds demand procedural fairness. *Id.*, at 485 citing *Little v. Streater*, 452 U.S. at 13 (1981). Our courts have also held that "[t]o relegate a defendant to the civil remedy of a malpractice suit for money damages is no remedy at all for the potential loss of liberty and the seriousness and permanence attached to an adjudication of paternity" *Banks v. Randall*, 466 A.2d 974, 977 (1984).

In *White v. Gordon*, 460 A.2d 828 (1983), the Petitioner appeared in court without an attorney, despite a warning from the judge at the previous listing that the matter would proceed to trial whether or not Petitioner was represented by legal counsel. At the trial, the Petitioner advised the judge that his counsel had withdrawn from the case and he had been unable to secure another attorney. *Id.*, at 829. "The Court, nonetheless, ordered the case to proceed to trial and, at the conclusion thereof, the trial judge entered a finding of paternity ..." Id. On appeal, the court concluded that a potential deprivation of liberty confronts any paternity defendant and paternity defendants must, at least, be afforded a reasonable opportunity to secure representation of counsel to assist in the defense of such claims. *Id.* at 830.

In *White*, the appellate court cited *Corra v. Coll*, 451 A.2d 480 (1982) in holding that the fourteenth amendment to the United States Constitution provides in part, "No state shall ... deprive any person of life, liberty or property without due process of law. *Id.*, at 482; and that persons forced to settle their claims of right and duty through the

judicial process must be given a meaningful opportunity to be heard *Id.* It is unquestionable that "[j]ust as termination of such [parent-child] bonds demand procedural fairness ... so too does their imposition." *Id.*, at 485 citing *Little v. Streater*, 452 US at 13 (1981).

"The need for procedural safeguards at a paternity hearing is apparent in light of the significant liberty interests placed in jeopardy at that juncture." *Corra*, at 486. "An adjudication of paternity impacts property interests as well." *Id.* In *Banks v. Randle*, 486 A.2d 974 (1984), the court stated that *Corra v. Coll*, supra and *White v. Gordon*, supra, had firmly established the right to counsel in paternity proceedings. *Kitrell v. Dakota*, 540 A.2d 301, 304 (1988).

Petitioner's legal counsel failed to appear for trial; she did not advise the Petitioner or the court that she did not plan to appear, nor did she offer the Petitioner or the court any reason for her absence either prior to or after the hearings. Surprised by his counsel's absence, Petitioner requested that the court permit him the opportunity to secure legal representation. The court refused the Petitioner's requests and over Petitioner's strong objections forced him to proceed without legal representation. The court's refusal to permit the Petitioner a reasonable opportunity to secure legal counsel was an abuse of discretion and violated the Petitioner's constitutional rights to due process and equal protection.

When an alleged father denies paternity, female litigants are provided legal representation through the county's Domestic Relation's Office. Plaintiffs are assured of legal representation, such as the case on appeal, where the respondent was afforded experienced legal counsel by Dauphin County. Despite Petitioner's strong objections

that he was not prepared to proceed, not being a domestic relations attorney capable of handling a paternity action, the court allowed the Petitioner only a few minutes to prepare before proceeding with the hearing. Following the absence of his legal counsel, Petitioner was denied the same right, an opportunity to be represented by experienced legal counsel. In such instances, alleged fathers are denied equal rights. The court's refusal to allow the Petitioner the right to secure legal counsel produced what the court warned against, "a judgment rendered in this matter is not only unfair, it is unreliable." *Corra*, supra at 487.

Our state appellate courts and federal courts have clearly held that It is unquestionable that in civil paternity cases, a defendant has a right to legal representation, which has been deemed a right of due process. *Kitrell v. Dakota*, 540 A.2d 301 (1988), citing U.S.C.A. Const. Amends. 5, 6, 14, *Little v. Streater*, 452 U.S. at 13 (1981).

"The need for procedural safeguards at a paternity hearing is apparent in light of the significant liberty interests placed in jeopardy at that juncture." *Corra*, at 486. "An adjudication of paternity impacts property interests as well." *Id.* In *Banks v. Randle*, 486 A.2d 974 (1984), the court stated that *Corra v. Coll*, supra and *White v. Gordon*, supra, had firmly established the right to counsel in paternity proceedings. *Kitrell v. Dakota*, 540 A.2d 301, 304 (1988). The test applied currently to ineffective assistance of counsel in criminal cases applies with equal force to civil cases, such as paternity cases, where rights to effective assistance of counsel have been deemed a requirement of due process. *Kitrell*, supra.

Here in Pennsylvania, a complainant in a support action at which paternity is disputed shall be represented by the district attorney. *Corra* at 487. "A paternity

proceeding often becomes an adversary contest between a complainant, backed by the resources of a skilled attorney, and the uncounselled accused father." *Id.* A judgment rendered in this manner is not only unfair, it is unreliable." *Id.* "The legislature has offered the mother and child the assistance of counsel in prosecuting their claim." *Id.* "However, by intervening heavily on behalf of one side what has traditionally been a private dispute, the state has skewered the outcome of the case." *Id.* The chances that the significant consequences of fatherhood will be imposed upon an innocent man obviously increase dramatically if he is without counsel. *Id.*

"They increase still further if counsel for the plaintiff is a specialist in prosecuting such claims." *Id.* "The state's interest is best served by a hearing at which a defendant accused of parentage is represented by an attorney. *Id*, at 488. It is unquestionable that in civil paternity cases, a defendant has a right to legal representation, which has been deemed a right of due process. *Kitrell v. Dakota*, 540 A.2d 301 (1988), citing U.S.C.A. Const. Amends. 5, 6, 14.

B. WHERE THE TRIAL COURT HELD THAT THE PETITIONER HAS NO RIGHT TO LEGAL COUNSEL OR TO EFFECTIVE ASSISTANCE OF COUNSEL, AND THAT PETITIONER'S REMEDY IS TO BRING A LEGAL ACTION AGAINST HIS ATTORNEY PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS. U.S.C.A. CONST. AMENDS. 5, 6, 14

The trial court committed legal error, and abused its discretion in holding that the appellant's rights to legal counsel and effective assistance of counsel do not apply in a civil paternity matter. Likewise, the trial court erred in holding that the appellant's remedy is a legal action against his legal counsel. Based upon his attorney's apparent lack

of preparation and her failure to appear for trial, appellant also raised the issue of ineffective assistance of counsel. The court held that: "In a criminal matter that might be relevant; in this matter it's not ...."

The court also committed legal error and abused its discretion in denying appellant's repeated requests for the assistance of counsel and holding that appellant's remedy was to bring an action against his attorney.

It is well established that a defendant has a right to legal representation in a paternity action. *White*; *Corra*; *Banks*; *Kitrell*, supra. The "defendant's due process right to counsel entities the defendant to effective assistance of *Bohn v. Lunger*, 490 A.2d 465 (1985), citing *Banks*, supra. "Given the recognition of the right to counsel for paternity, defendants in *Cora v. Coll*, supra and *White v. Gordon*, supra, we find it impossible to deny a ... defendant the right to effective assistance of counsel" *Bohn*. "It is axiomatic that the right to assistance of counsel means the right to effective assistance of counsel. *Id.*, citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Powell v. Alabama*, 287 U.S. 45 (1932); *Commonwealth v. Kale*, 480 A.2d 291 (1984). "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel." *Bohn*, citing *McMann v. Richardson*, 397 U.S. 779 (1970). "Indeed, without the guidance of competent counsel, appellant's right to representation would be rendered worthless." *Bohn*, supra, citing *In re. Hutchinson*, 421 A.2d 261 (1980). Thus, were we to hold that a paternity defendant's right to counsel does not require the effective assistance of counsel; we would be exhalting form over content. *Bohn*, supra.

Holding as we do that the law contemplates the assistance of effective counsel, it follows that appellant may

raise the issue of ineffectiveness on appeal. To relegate appellant to the civil remedy of a malpractice suit for money damages is no remedy at all for the potential loss of liberty and the seriousness and permanence attached to an adjudication of paternity. Hence, appellant's ineffectiveness claims must be studied in order to determine an appropriate remedy. *Banks*, supra.

The court must first determine whether the issue underlying the charge of ineffectiveness is of arguable merit. *Commonwealth v. Shepard*, 483 Pa. 183, 394 A.2d 971 (1978). If the underlying issue is found to be of arguable merit, our inquiry shifts to a determination of whether the course chosen by counsel had some reasonable basis aimed at promoting his client's interests. *Commonwealth v. Evans*, 489 Pa. 85, 91, 413 A.2d 1025, 1028 (1980); *Commonwealth v. Shepard*, supra. *Commonwealth v Jenkins*, 285 Pa. Super 294, 298-9, 427 A.2d 231, 232 (1981). *Commonwealth v. Golson*, 310 Pa. Super. 532, 535, 456 A.2d 1063 (1983).

Here, petitioner's counsel failed to communicate with the petitioner and, in fact, petitioner's counsel failed to appear for trial and did not advise the petitioner or the court that she would not appear, nor did counsel offer any reason for her absence. Under such circumstances, the petitioner clearly has demonstrated that his counsel was ineffective, and counsel's actions had no reasonable basis aimed at promoting the defendant's interests. Petitioner believes that he has demonstrated as a matter of law that his counsel was ineffective.

The court noted that *Commonwealth v. Grant*, 813 A.2d 726 (2002) does not bar the adjudication of all ineffective assistance of trial claims on direct appeal. *Com of PA v. James W. Thornton, 822 A.2d 31 (2003).* The new

rule leaves open the issue regarding the propriety of raising a claim on direct appeal the trial counsel's ineffectiveness, which is apparent of record. *Id.* The *Grant* court cites *United States v. Gambino*, 788 F.2d 938, 950 (3d Cir. 1986) for the proposition that ... "exceptional circumstances may exist where ineffectiveness is patent on the record and therefore, can be addressed on direct appeal." *Com v. Thornton.*

"[T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *McAleese v. J. F. Mazurkiewicz, Warden, et al.*, 1 F.3d 159 (3d Cir 1993). Here, it is clear on the record that appellant's counsel was ineffective, and counsel's actions had no reasonable basis aimed at promoting the defendant's interests, or was counsel's performance reasonable under prevailing norms.

Accordingly, the lower courts refusal to allow the Petitioner to secure legal representation and the courts holdings that the petitioner does not have a right to legal counsel in a civil paternity hearing; that the right applies in a criminal setting, and that the Petitioner's remedy is a cause action against his counsel is violates state and federal laws, is contrary to Pennsylvania Supreme and Superior Court and United States Federal Court decisions and denies the Petitioner his constitutional and statutory rights constitutes a special and important reason justifying Petition for Certiorari.

II. THE DECISION BELOW IS INCORRECT

A. THE TRIAL COURT'S ADMISSION INTO EVIDENCE TIMELY OBJECTED TO DNA TESTS AND THE COURT'S DECISION ESTABLISHING PATERNITY BASED UPON INCOMPETENT DNA

TESTS VIOLATES FEDERAL AND STATE STATUTORY REQUIREMENTS AND THE PETITIONER'S CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION.

The trial court erred in admitting the DNA tests into evidence without proper foundation, authentication or proof of accuracy or without cross-examination to germane answers sought by Petitioner which prevented Petitioner from conducting a full and fair cross examination. See *Wiegand v. Wiegand*, 363 A.2d 1215 (1976).

Prior to the December 21, 2004 and January 3, 2005 hearings on August 20, 2004 pursuant to the statutory requirements of 42 U.S.C. § (f) (i) (ii) (iii) and 23 Pa. C.S.A. § 4343(c) (3), the petitioner filed written notice of his objections to the DNA tests.

At trial, petitioner questioned whether the respondent would produce expert testimony subject to cross-examination. The respondent failed to provide any expert or medical testimony and petitioner repeatedly objected to the admission of the DNA tests without proper proof.

The trial record shows that although the court presumed that an objection was raised and none of the appropriate authentication is entered, nonetheless, overruled the petitioner's objections to the DNA tests. Subsequently, the court based its verdict of paternity on the DNA tests.

There are a number of statutes that provide for authentication of various types of evidence ... including 23 Pa. C.S.A. § 4343 genetic tests to determine paternity.

Weissenbergers Pennsylvania Evidence 2006 Court Room Manual (451).

23 Pa. C.S.A. §4343(c)(3), provides in pertinent part: "The certified record shall be admissible into evidence without further foundation, authentication or proof of accuracy if no objection is made within ten days prior to trial." This statutory provision is mandated by 42 U.S.C. §§ 666(f) (i) (ii), (iii), which requires states to establish procedures concerning the admissibility of genetic testing.

Federal law requires states to establish procedures for admission of genetic tests which meet established requirements into evidence for establishing paternity without the need for foundation testimony or other proof of authenticity or accuracy unless objection is made ....

42 U.S.C. §§ 666(F) provides:

(F) Admissibility of genetic testing results

Procedures–

(i) Requiring the admission into evidence, for purposes of establishing paternity, of the results of any genetic test that is–

(I) Of a type generally acknowledged as reliable by accreditation bodies designated by the Secretary; and

(II) Performed by a laboratory approved by such an accreditation body;

(ii) Requiring an objection to genetic testing results to be made in writing not later than a specified number of days before any hearing at which the results may be introduced into evidence (or, at State option, not later than a specified number of days after receipt of the results); and

(iii) Making the test results admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy, unless objections is made.

Trial was held on the issue of paternity on December 21, 2004 and January 3, 2005. Prior to trial and throughout the proceedings, the Petitioner raised timely objections to the improper admission into evidence of the DNA tests.

In Dauphin County, all domestic relation pleadings are served through the County's Domestic Relations Section. The Petitioner's timely objections were properly served via United States Certified Mail, Return Receipt Requested on August 20, 2004 and were received by the Dauphin County Domestic Relations Section on August 23, 2004. (See App. G Infra. 12a) Nonetheless, the trial court dismissed Petitioner's objections and refused to permit Petitioner to place the written objections and the certified mail receipts into the record.

The trial court's admission of the DNA tests into evidence is an error of law and a manifest abuse of discretion. The trial court's disregard of the Petitioner's timely objections to the DNA tests and the admission of incompetent evidence are extremely prejudicial and harmful to the Petitioner. The trial court erred in allowing the DNA tests into evidence without any foundation,

authentication or proof of accuracy or any scientific or medical testimony. Absent the improperly admitted DNA tests, the respondent has no competent proof to establish petitioner's paternity *Jones v. Trojar*, 586 A.2d 397 (1990), affirmed, 634 A.2d 201.

Contrary to the trial court's decision that the Petitioner failed to rebut the DNA tests by clear and convincing evidence (Memorandum pursuant to Pa. R.P.A. 1925(a), See App. E. Infra. 7a) Petitioner had no burden of proof to rebut the improperly admitted DNA test.

Genetic testing creates a rebuttable presumption of paternity but does not establish it. U.S.C.A. Const. Amend. 14, *State of Hawaii v. DOC*, 88 Haw.159, 963 P.2d 1135 (1998). The experts must be called by the Court as witnesses to testify to their findings and are subject to cross-examination by the parties." *25 Standard Pennsylvania Practice 2d.* §126:1260 (2001). The defendant may also establish that the controls failed in testing, the chain of custody was breached, the sample was contaminated, the mechanical or laboratory processes were flawed, the computations or computer analyses were incorrect or in any other way that the process was compromised. *Reed v. Boozer*, 693 A.2d 233, 241 (1997).

Expert testimony on blood tests is not absolute, unwaiverable requirement in every paternity case; rather need for it will arise from particular circumstances of litigation; where alleged father denies paternity and challenges admission of plaintiff's scientific or medical evidence, experts will need to be called to testify. *Tyler v. King*, 496 A.2d 16 (1985). Absent an agreement to the contrary, a party to a paternity determination has full right to challenge admissibility ... of the test results. *Rodgers v. Woodin*, 672 A.2d 814 (1996).

The controlling authority in the Commonwealth of Pennsylvania is that tests may be considered as evidence of paternity only if the results are adequately proved. *Jones v. Trojar*, 586 A.2d 397 (1990) affirmed, 634 A.2d 201; and a mother's testimony does not conclusively establish paternity. *In re the Estate of Simmons-Carson*, 644 A.2d 791 (1994). Absent proper authentication and proof, results of blood test could not be considered in determining putative father's paternity in support action; record did not contain medical testimony interpreting test results, and it did not appear that the parties stipulated to the admissibility of laboratory reports. Supra, *Jones v. Trojar*. This rule applies whether tests are of the H.L.A. or DNA variety. *Zearfoss v. Frattaroli*, 646 A.2d 1238 (1994). Here, the Petitioner did not stipulate to the admissibility of the laboratory reports. To the contrary, the Petitioner repeatedly challenged and objected to the laboratory reports. Despite petitioner's frequent and timely objections, the trial court admitted the test results into evidence without any foundation, authentication or proof of accuracy. In response to the Petitioner's objections to the admission of the DNA tests, the trial court, although presuming that an objection was raised and none of the proper authentication is entered, nonetheless, overruled the petitioner's objections.

The trial court's admission of the DNA tests into evidence was an error of law and a manifest abuse of the trial court's discretion which was severely harmful and prejudicial to the Petitioner. Due to the Respondent's failure to present any proper proof, the Petitioner had no burden to rebut the DNA tests. Supra, *Jones v. Trojar*, *Zearfoss v. Frattaroli*. The court's verdict is unsupported by the evidence and there is insufficient evidence to support the court's conclusions, which constitute an error of law.

Payne v. Kassab, 468 PA 226, 361 A.2d 263 (1976); *Vacco v. Marcus*, 485 A.2d 506 (1984).

In *White v. Gordon*, 460 A.2d 828 (1983), the appellate court cited *Corra v. Coll*, 451 A.2d 480 (1982) in holding that the fourteenth amendment to the United States Constitution provides in part, "No state shall ... deprive any person of life, liberty or property without due process of law. *Id.*, at 482; and that persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard Id. It is unquestionable that "[j]ust as termination of such [parent-child] bonds demand procedural fairness ... so too does their imposition." *Id.*, at 485 citing *Little v. Streater*, 452 US at 13 (1981).

In *Little v. Streater*, the alleged father, an incarcerated inmate sought to have blood grouping tests as exculpatory evidence in a paternity action. The appellant asserted that he was indigent and asked that state be ordered to pay for the tests. The state refused to pay, and for financial reasons, no blood grouping tests were performed even though they had been authorized. *Streater* at 3, 4. Both appellee and appellant testified at trial Id., at 4. After testimony, the court found that appellant was the child's father. Id. The appellate court found no error in the trial court's denial of appellant's motion that the cost of blood grouping tests be paid by the state. Id. At 5. "Thereafter, appellant's Petition for Certification was denied by the Connecticut Supreme Court ... and we noted probable jurisdiction, 449 U.S. 817 (1980)." Id.

Here, as in *Streater*, that unlike a common dispute between private parties, the state's involvement in paternity proceedings are considerable and manifest, giving rise to a constitutional duty. Streater at 9.

Here, as in *Streater*, the state referred this mandatory paternity suit to Dauphin County Title IV D attorney for prosecution and paid respondent's fees as well as all costs of the litigation. In addition, support payments are made to the state, pursuant to the trial court's judgment. *Streater* at 9. "State action" has undeniably pervaded this case. Id. The nature of paternity proceedings in Pennsylvania (as in Connecticut) also bears heavily on petitioner's due process claim. Id. "Although the state characterizes such proceedings as "civil" ... they have quasi-criminal overtones." Id.

In Pennsylvania, if there is a finding of paternity, the court shall order him to stand charged with the support and maintenance of such child; and his subsequent failure to comply with the court's support order as well as attachment of wages and seizure of property, is punishable to imprisonment.

In *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), the Court held that "due process requires, at a minimum, that, absent a countervailing state interest of overriding significance, persons forced

> to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

Accord, Armstrong v. Manzo, 380 U. S. 545, 552 (1965); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306, 313 (1950). And in *Mathews v. Eldridge,* 424 U. S. 319, 335 (1976), we explained:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected

> by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

These standards govern appellant's due process claim, which is premised on the unique quality of blood grouping tests as a source of exculpatory evidence, the State's prominent role in the litigation, and the character of paternity actions under Connecticut law. *Streater* at 5, 6.

Assessment of the Matthews v. Eldridge factors indicate that petitioner did not receive the process he was constitutionally due. See *Streater* at 14-17. Denied the rights to challenge DNA test evidence in a paternity case, a defendant who faces the state as an adversary and who must overcome the evidentiary burden the state imposes lacks a "meaningful opportunity to be heard." Therefore, "the requirement of fundamental fairness" expressed by the due process clause was not satisfied here. See *Streater* at 16, 17.

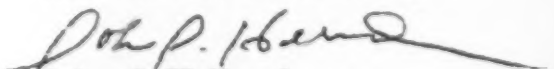
In *Streater*, this Court held that due process unlike some legal rules, is not a technical conception with a fixed content ... rather, it is flexible and calls for such procedural protection as the particular situation demands. Id. At 5, citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972). This court also held in *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard".

Likewise, it would naturally follow, that the due process rights to blood grouping tests or DNA tests in a civil paternity action would also require that a litigant in a civil paternity action is afforded the due process rights to challenge DNA tests and a meaningful opportunity to be heard. Accordingly, the lower courts' refusal to consider the Petitioner's timely objections to DNA tests and the court's admission of the DNA tests into evidence without any foundation, authentication or proof of accuracy, or any scientific or medical testimony is violative of Pennsylvania and United States law. The court's decision violated the Federal and State statutory requirements pertaining to the admission of DNA evidence, is contrary to the State and Federal appellate decisions, and deprived the petitioner of property and liberty without a meaningful opportunity to be heard in violation of U.S. Const. Amendments 5, 14. The court's decision that the Petitioner failed to rebut inadmissible evidence by clear and convincing evidence in reaching a conclusion of paternity is violative to Pennsylvania and United States appellate court decisions and constitutes a special and important reason granting the Petition for Certiorari.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,



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(717) 503-2563
Attorney for Petitioner

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

CATHERINE J. LAYTON,	:	No 97 MAL 2007
	:	
Respondent	:	
	:	Application for
	:	Reconsideration
	:	
v.	:	
	:	
	:	
JOHN J. HOLLAND, ESQ.	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 22nd day of October, 2007, the Application for Reconsideration is hereby DENIED.

TRUE & CORRECT COPY
ATTEST: October 22, 2007

Norina K. Blynn, Chief Clerk

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

CATHERINE J. LAYTON,	:	No 97 MAL 2007
Respondent	:	
	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
JOHN J. HOLLAND, ESQ.,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 11th day of September, 2007, the Petition for Allowance of Appeal is hereby DENIED.

TRUE & CORRECT COPY

ATTEST: SEP 11 2007

NORINA K. BLYNN
CHIEF CLERK

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

CATHERINE J. LAYTON,	:	IN THE SUPERIOR COURT OF PENNSYLCANIA
v.	:	
JOHN J. HOLLAND, ESQUIRE	:	
APPELLANT	:	No. 498 MDA 2005

ORDER OF COURT

The Court hereby DENIES the application filed November 3, 2006, requesting reargument or reconsideration of the decision dated October 24, 2006.

PER CURIAM

DATE: January 2, 2007

TRUE COPY FROM RECORD
Attest: JAN 03 2007

J. McCullough

Deputy Prothonotary
Superior Court of PA - Middle District